Supreme Court, U.S.
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No. 92-1816

In The

Supreme Court of the United States

October Term, 1992

EDWARD RAY GREER, et al.,

Petitioners,

v.

ARTHUR LEE GASTON,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of South Carolina

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The Petition should be denied because the United States Supreme Court does not have jurisdiction over matters presented in Petition for Writ of Certiorari.

II. The Petition should be denied because the Petitioners' allegations have been fully aired and fairly disposed of at every level in the State courts of South Carolina.

A. The Petition should be denied because there is reasonable evidence to support the jury verdict in favor of the Respondent.

B. The Petition should be denied because there was no improper closing argument made by Respondent's counsel.

C. The Petition should be denied because the Greers did not raise issue of conflict of interest in support of their Motion for New Trial.

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STATEMENT OF THE CASE

The Petitioners, Mr. and Mrs. Greer, commenced this lawsuit by filing of a Summons and Complaint in the Court of Common Pleas for Chester County, South Carolina, on January 4, 1989. The Respondent, Mr. Gaston, timely answered the Summons and Complaint on February 3, 1989 and amended his Answer on March 3, 1989. This Summons and Complaint alleges legal malpractice against Mr. Gaston and has ultimately given rise to the Petition presently pending before this Court.

In the above captioned lawsuit, the Greers' Complaint alleges that Mr. Gaston settled two lawsuits without authority. These lawsuits are *John W. Matheson, et al. v. Edward Ray Greer, et al.*, C.A. No. 84-CP-12-213 (hereinafter "*Matheson* lawsuit") and *Frank B. McFadden v. Edward Ray Greer, et al.*, C.A. No. 84-CP-12-212 (hereinafter "*McFadden* lawsuit"). These two lawsuits involved a dispute over a property line between the Plaintiffs, the Mathesons and Mr. McFadden, on one side and the Greers, the Petitioners, on the other side of the property line. The Mathesons' and Mr. McFadden's claims were that the Greers were encroaching on their property. The Greers hired Mr. Gaston, the Respondent, to defend them in the *Matheson* and *McFadden* lawsuits.

In the *Matheson* and *McFadden* lawsuits, the Greers wanted the property line to be established through an old hickory stump with a piece of barbed wire on it. The line would have run from a poplar tree on the northeastern corner of the property through the hickory stump to a dogleg on the S.C. Highway 21 (western) side of the

property. The old hickory stump was the important reference point to the Greers, and the Greers had a Polaroid picture of the hickory stump at trial.

The *McFadden* and *Matheson* lawsuits were to be tried non-jury on September 24, 1985. A pre-trial conference was held during the morning. The presiding judge, the Honorable Edward B. Cottingham, suggested that the parties consider settling. Paul Hemphill, Jr., representing the Mathesons and Mr. McFadden, brought several settlement proposals to Mr. Gaston for the Greers to consider. Ultimately, Mr. McFadden and the Mathesons agreed to run the property line through the old hickory stump to the poplar tree on the back corner of the property. This was the way the Greers wanted the property line to run. This settlement proposal included the court appointment of two surveyors to establish the boundary line in dispute according to geographical references specified by Mr. and Mrs. Greer. The Greers agreed to this settlement proposal which was made during the afternoon of September 24, 1985. The Greers never disagreed with the final settlement proposal by telling Mr. Gaston to "start the trial." The Greers did not utter this phrase during the settlement negotiations in the afternoon. After the survey was completed, the Greers apparently did not like the resulting boundary line and sued Mr. Gaston.

A jury trial was held in the above captioned legal malpractice case against Mr. Gaston in Chester County on February 11, 12, and 13, 1991 with the Honorable Luke N. Brown, Jr. presiding. The jury rendered a verdict in favor of Mr. Gaston on February 13, 1991.

The Greers made a motion for a new trial after the jury verdict. This motion was denied. The Greers appealed from Judge Brown's denial of their motion for a new trial.

Briefs were filed, and oral argument was heard by the South Carolina Court of Appeals on November 5, 1992. The Court of Appeals filed an opinion on November 18, 1992 affirming the trial court. The Petitioners filed a Petition for Rehearing which was denied on November 30, 1992.

The Petitioners filed a Writ for Certiorari from the South Carolina Supreme Court to the Court of Appeals on or about December 21, 1992. This Petition was denied on February 18, 1993.

REASONS FOR DENYING THE PETITION

I. The Petition should be denied because the United States Supreme Court does not have jurisdiction over matters presented in Petition.

The United States Supreme Court does not have jurisdiction over the matters presented by the Petition for Writ of Certiorari. The matters covered by the Petition involve a common law tort, specifically legal malpractice. The alleged malpractice occurred between the Petitioners, Edward Ray Greer and Mrs. Greer, and their attorney, Arthur Lee Gaston, the Respondent, all residents of the State of South Carolina. Prior to the Petition to this Court,

the matters encompassed in the Petition have been exclusively heard by the state courts of the State of South Carolina.

There were no issues raised at any point in these proceedings or in the Petition to this Court which would invoke the jurisdiction of the United States Supreme Court under Article 3 of the United States Constitution, 28 U.S.C. § 1257, or Rule 10, Supreme Court Rules. As a result, lacking jurisdiction, the United States Supreme Court should deny the Petition for a Writ of Certiorari.

II. The Petition should be denied because the Petitioners' allegations have been fully aired and fairly disposed of at every level in the State courts of South Carolina.

The courts of the State of South Carolina have allowed the Greers to fully air their allegations against Mr. Gaston, and those courts have fairly reviewed and disposed of those allegations according to the applicable law.

Mr. and Mrs. Greer fully aired their allegations against Mr. Gaston during a three day trial in the Court of Common Pleas for Chester County, South Carolina. The jury returned a verdict in favor of Mr. Gaston.

The Greers appealed to the South Carolina Court of Appeals. The Greers fully briefed the grounds for their appeal to the Court of Appeals. These grounds are the same grounds that the Greers now urge in their Petition for review by this Court. The Court of Appeals heard oral

argument and affirmed the jury verdict in favor of Mr. Gaston.

The Greers petitioned for a Writ of Certiorari from the South Carolina Supreme Court to the Court of Appeals. These grounds are the same grounds that the Greers now urge in their Petition for review by this Court. This Petition was denied.

As the Greers' allegations have been fully aired both at the trial level and the appellate level in the courts of the State of South Carolina, the Greers have not suffered any deprivation that would invoke the jurisdiction of this Court. Further, no such deprivations have been set forth in the Greers' Petition. Arguments raised by the Greers in their Petition for a Writ of Certiorari before this Court, while not relevant, are discussed below.

A. The Petition should be denied because there is reasonable evidence to support the jury verdict in favor of the Respondent.

The Greers' basis for their Petition seems to be that the trial judge should have granted a new trial based on an insufficiency of evidence to support the jury verdict in favor of Mr. Gaston. The South Carolina Court of Appeals fully considered this issue and held:

> "There is evidence to support the finding implicit in the jury's verdict that Gaston did not settle the boundary dispute cases without authority."

(See Appendix A to Petition for Writ of Certiorari.) In South Carolina, a jury verdict on appeal will only be

overturned if a review of the record discloses no evidence reasonably supporting the verdict. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984); and *Hackler v. Earl Wiegand Real Estate, Inc.*, 295 S.C. 396, 368 S.E.2d 686 (S.C. App. 1988). As a result, the Greers have not suffered deprivation of rights which would invoke this Court's jurisdiction and review. Furthermore, there is sufficient evidence in the record of the South Carolina proceedings to reasonably support the jury verdict in favor of Mr. Gaston.

Witnesses testified at the trial of the legal malpractice case against Mr. Gaston that the Greers agreed to the terms of the settlement. By specifically agreeing to the settlement, the Greers ratified their attorney's actions, and they are estopped from complaining about the settlement. *See L.F.S. Corp. v. Kennedy*, 287 S.C. 162, 337 S.E.2d 209 (1985).

The terms of the settlement were announced in open court with all parties present. The Greers did not speak out and oppose the settlement. In addition, Judge Cottingham, the trial judge, specifically addressed the parties to the *Matheson* and *McFadden* lawsuits, including the Greers, in regard to their consent to the settlement and its terms. The Greers did not voice opposition to the settlement at this time. The Greers did not disagree with the final settlement proposal by telling Mr. Gaston to "start the trial." The Greers did not utter this phrase during the latter stage of the settlement negotiations.

By remaining silent, the Greers ratified the settlement. Such ratification may be implied from the client's negligence, inattention, or apparent acquiescence in the

compromise. *L.F.S. Corp. v. Kennedy*, 287 S.C. 162, 337 S.E.2d 209 (1985); *Ross v. State*, 250 S.C. 442, 158 S.E.2d 647 (1967); 7 Am.Jur.2d *Attorneys at Law* § 157 (1980); and *see also Irby v. Richardson*, 278 S.C. 484, 298 S.E.2d 452, 454 (1982).

More importantly, there are documents signed by Mr. Greer indicating that he and Mrs. Greer had approved of the settlement. In the Proposed Case and Exceptions, signed by Mr. Greer, in the appeal of *Greer v. Roy McFadden* (still another lawsuit which involved a general warranty deed and the same property line and which arose after the alleged unauthorized settlement), the Greers stated, in regard to the *Matheson* and *McFadden* lawsuits, that:

> "*the parties to those actions agreed* that the two surveyors appointed by the Court would run a line between the parties from the joint rear corner of the Matheson and Greer properties to a point on U.S. Highway 21 . . . " (Emphasis added.)

This is written evidence that the Greers agreed to the terms of the settlement of the *Matheson* and *McFadden* lawsuits.

After the alleged unauthorized settlement, the Greers filed a grievance against Mr. Gaston alleging only an exorbitant fee and a conflict of interest in regard to the *Matheson* and *McFadden* lawsuits. The Greers did not complain about Mr. Gaston settling the *Matheson* and *McFadden* lawsuits without authority anywhere in their grievance filings. However, the Greers did admit that they approved the settlement in their grievance filings. In a document filed by the Greers, Mr. Greer said that "it

was proposed to me to have the line follow the old fence which I had always preferred and *I agreed.*" (Emphasis added.) This is further written evidence that the Greers agreed to the terms of the settlement of the *Matheson* and *McFadden* lawsuits.

The Greers' arguments concerning the insufficiency of evidence to support a jury verdict in favor of Mr. Gaston are meritless. Furthermore, these arguments do not support the Greers' Petition to invoke the jurisdiction of this Court and contain no allegation of any deprivation of rights requiring this Court's review.

B. The Petition should be denied because there was no improper closing argument made by Respondent's counsel.

The Greers suggest that the following statement made by Respondent's counsel in closing argument at the legal malpractice trial was slanderous, and presumably prejudicial, requiring that the jury verdict be overturned: ". . . because we know Mr. Greer doesn't like to pay people who work for him. He didn't pay Mr. Hager." This statement cannot be the basis of granting the Petition.

In South Carolina, an objection to a statement made in closing argument must be made at the time the statement is made in order to be preserved for appeal. *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711, 714 (1986); *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (1983); and *Rental Uniform Service of Greenville, South Carolina, Inc. v. K&M Tool and Die, Inc.*, 292 S.C. 571, 357 S.E.2d 722, 724 (S.C. App. 1987).

The South Carolina Court of Appeals held that the Greers raised no objection during the closing argument to this statement, and as a result, they waived any right to question this statement. (See Appendix A to Petition for Writ of Certiorari.) The South Carolina Court of Appeals appropriately applied the law on this issue and allowed a full and fair hearing to the Greers and properly disposed of this matter. As a result, this Court should dismiss this ground of the Greers' Petition.

The Greers' Petition citing a discussion about an exception had nothing to do with closing argument and occurred at a different time. The context in which this discussion in the transcript arose dealt with an evidentiary matter during the course of trial and not at the time of closing argument.

Even if the Greers did not waive their rights by failing to object, the Greers have made no showing that this statement gives rise to grounds for granting their Petition. The Greers' selection of testimony cited in their Petition to contradict the statement in closing argument is misleading and taken out of context. The statement is based upon testimony in the trial record. Mr. Hager, a surveyor, testified that he was due compensation from the Greers for his work on the property line in question:

> Q. I thought you said awhile ago you wouldn't. If anybody wants a copy, you've got to have some money.
>
> A. That would be – let it be understood, Mr. Greer, that I spent three days of my life with two or three paid employees making a survey. And –

Q. You didn't get paid for it?

A. I am due compensation. Let it be understood, Mr. Greer, that I spent several hours of my life doing a survey for you, which, for some reason, you decided to hire another surveyor, and I never billed you, but you never attempted to settle with me.

It is clear from this testimony that Mr. Greer did not pay Mr. Hager and Mr. Hager expected to be paid. Finally, Mr. Hager, out of exasperation at the end of his cross examination, said the Greers owed him nothing. As a result, the statement made in the closing argument accurately reflected the testimony.

Moreover, the Greers' attack on Respondent's counsel is unfounded because the statement is absolutely privileged. The well-settled law in South Carolina is that attorneys are absolutely privileged for statements made in closing argument as long as the statements are relevant and pertinent to the issues involved. *Redfearn v. Pusser*, 276 S.C. 506, 280 S.E.2d 206 (1981) (defamatory matter contained in pleadings is absolutely privileged if pertinent and relevant to the issues in the case); *McKesson & Robbins, Inc. v. Newsome*, 206 S.C. 269, 33 S.E.2d 585, 587 (1945); *Wall v. Blalock*, 245 N.C. 232, 95 S.E.2d 450 (1956) (statements made by attorney in course of a trial are absolutely privileged provided the statements are material and pertinent); Annot., 61 A.L.R.2d 1300 (1958); 50 Am. Jur. 2d *Libel and Slander* § 246 (1970); RESTATEMENT (SECOND) OF TORTS § 586 (1977).

During the trial, the Greers raised the issue of the excessiveness of Mr. Gaston's fee, and their dissatisfaction with it, for his work on the *Matheson* and *McFadden*

lawsuits. In fact, prior to filing the grievance, Mr. Greer demanded that the monies the Greers paid to Mr. Gaston be refunded, or the Greers threatened to file a grievance. The statement made in closing argument was pertinent and relevant because it showed the Greers' dissatisfaction with others who worked for them and their dislike of paying for goods and services they received. Furthermore, since the Greers brought up the alleged excessiveness of Mr. Gaston's fee, and their dissatisfaction with it, this issue had to be dealt with in closing argument.

Under this heading of their Petition, the Greers slip in argument concerning fraud and the elements thereof. Fraud has never been part of the above captioned lawsuit at either the trial or appellate levels. The Petitioner's complaint did not contain a cause of action for fraud. Fraud was not a cause of action tried in the legal malpractice lawsuit which has given rise to this Petition. As a result, there is no basis for the Greers making fraud an issue in or grounds for their Petition.

The Greers' arguments concerning alleged slander are meritless. Furthermore, these arguments do not support the Greers' Petition to invoke the jurisdiction of this Court and contain no allegation of any deprivation of rights requiring this Court's review.

C. The Petition should be denied because the Greers did not raise issue of conflict of interest in support of Motion for New Trial.

There is nothing in the record of the proceedings which indicates that the Greers moved for a new trial, or sought any other type of relief, on the basis of any alleged

conflict of interest involving Mr. Gaston. The Greers only point to Mr. Greer's objection to the introduction into evidence of two trial exhibits. As there was no basis in the record for raising this issue on appeal, the South Carolina Court of Appeals correctly held that the Greers had failed to carry their burden of furnishing a sufficient record to determine error in this regard. (See Appendix A to-Petition for Writ of Certiorari.) *Hamilton v. Greyhound Lines East*, 281 S.C. 442, 316 S.E.2d 368 (1984); and *Hobgood v. Pennington*, 300 S.C. 309, 387 S.E.2d 690, 693 (S.C. App. 1989). This Court should dismiss this ground of the Greers' Petition.

Furthermore, there was no conflict of interest. The Greers appear to claim two separate instances of a conflict of interest: (1) representation by Mr. Gaston's father of Frank B. McFadden in a loan closing in 1933; and (2) prior representation of Mr. and Mrs. Matheson. These allegations of conflicts of interest have no merit.

In 1933, David A. Gaston, Mr. Gaston's father, closed a loan to Frank B. McFadden from the Federal Land Bank. In a loan closing, the attorney represents the lender. There is no evidence that Mr. Gaston or his father represented Frank B. McFadden at any time prior to the filing of the *McFadden* lawsuit. In the *McFadden* lawsuit, Paul Hemphill represented Frank B. McFadden. Mr. Gaston has also never represented Mr. and Mrs. Matheson. Paul Hemphill represented the Mathesons in the *Matheson* lawsuit. Mr. Gaston has represented two other parties in opposition to the interests of Mr. and Mrs. Matheson prior to the filing of the *Matheson* lawsuit. In a divorce

action, Mr. Gaston represented the husband of the Mathesons' daughter. Later, Mr. Gaston represented the Mathesons' daughter in a dispute that the daughter had with her parents concerning an outstanding loan and the repayment of a promissory note. There is no evidence that Mr. Gaston ever represented Mr. and Mrs. Matheson in any matter.

The Greers' arguments concerning the alleged conflict of interest are meritless. Furthermore, these arguments do not support the Greers' Petition to invoke the jurisdiction of this Court and contain no allegation of any deprivation of right requiring this Court's review.

CONCLUSION

As there are no issues raised in the Petition, or at any point in the proceedings involved in the above captioned case, which invoke the jurisdiction of the United States Supreme Court under Article 3 of the United States Constitution, 28 U.S.C. § 1257, or Rule 10, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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